Supreme Court, U.S.
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No. 94-1779

In the
# Supreme Court of the United States
October Term, 1994

MICHAEL Q. JONES, INC.

*Petitioner,*

v.

COUNTY OF TUOLUMNE and
ALL PERSONS INTERESTED IN THE
MATTER OF VALIDITY OF THE COUNTY
SERVICES IMPACT FEE,

*Respondents.*

**On Petition for Writ of Certiorari
to the Court of Appeal,
State of California, Fifth Appellate District**

## RESPONDENT'S BRIEF IN OPPOSITION

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## RESPONDENT'S BRIEF IN OPPOSITION

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Respondent County of Tuolumne ("County") respectfully requests that this Court deny the Petition for Writ of Certiorari of Petitioner Michael Q. Jones, Inc. ("Jones" or "Petitioner"), which seeks review of the unpublished opinion of the Court of Appeal, State of California, Fifth Appellate District, in which the court unanimously affirmed the summary judgment granted by the trial court.

## STATEMENT OF THE CASE

Respondent Tuolumne County adopts and incorporates by reference the statement of facts as set forth in the decision of the California Court of Appeal, Fifth Appellate District. (App. A, A-2 to A-4.[1]) The County also incorporates the undisputed facts summarized in the opinion below at App. A, A-12 to A-18.

The California Supreme Court denied review of the Court of Appeal decision on January 25, 1995. (App. D.) Petitioner filed the Petition for Writ of Certiorari on April 24, 1995, and County received it on April 25, 1995. This Brief in Opposition is timely filed pursuant to United States Supreme Court Rule 15.

## REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari asserts that the decision below has contributed to a growing conflict between California courts and the United States Supreme Court. This assertion is erroneous for several reasons.

First, the opinion of the California Court of Appeal, which upholds the imposition of a $1,723.81 county services impact mitigation fee on Jones, is unpublished. Pursuant to Rule 977 of the California Rules of Court, an opinion that is not ordered published "shall not be cited or relied on by a court or a party in any other action or proceeding [with exceptions not applicable here]." The decision below thus has no precedential value. The "contribution" of this unpublished decision to Petitioner's perceived conflict is non-existent.

Second, the opinion below does not even decide the first Question Presented for Review in the Petition for Writ of Certiorari. The California Court of Appeal did not decide whether the heightened standards of judicial review mandated by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987),

[1] All references in this brief to "App." are references to the Appendices to the Petition for Writ of Certiorari.

and *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), apply to financial exactions in the form of development impact mitigation fees. Rather, the court assumed that the standards set forth in those cases did apply, and determined that Tuolumne County's development fees met those standards.

Third, the court below was entirely correct in upholding the fees, which comply with even the heightened standards set forth in *Nollan* and *Dolan*.

Fourth, the second Question Presented in the Petition, based on the erroneous assertion that the fee was based on a 30-year extrapolation of a general fund shortfall, relates to the particular circumstances of this case, and attempts belatedly to raise a factual issue that is completely unsupported by the record.

Finally, the Petition also asserts that the decision below conflicts with opinions of the New York Court of Appeals because the New York cases follow the *Dolan* decision while the California courts do not. Neither of the two New York cases on which Petitioner relies involve development impact mitigation fees or the applicability of *Dolan* to the calculation of such fees. Moreover, the decision below did apply the *Dolan* standards and presents no conflict with the New York cases.

## I.

## THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT

### A. The decision below did not decide whether the heightened scrutiny of *Nollan* and *Dolan* applies to development impact mitigation fees, but held that the County's fee met even the heightened standard of review set forth in those cases.

The first Question Presented in the Petition (at i) is: "Do the heightened standards of judicial review in regulatory takings cases, mandated by this Court in *Nollan v. California Coastal*

*Commission* and *Dolan v. City of Tigard*, apply to financial exactions in the form of development impact mitigation fees?" The County acknowledges that there may be some uncertainty as to whether the heightened scrutiny mandated by this Court in *Nollan* and *Dolan*, both of which involved exactions of land or interests in land, is applicable in the case of a purely monetary exaction of a fee based on a development's proportionate share of the costs imposed by all new development of that type.[2] This case is not, however, the proper case for review of that issue, for the simple reason that the California Court of Appeal did not decide it. The court below in fact applied the *Nollan* and *Dolan* standards to the fee at issue in this case.

Although Petitioner asserts that the State Courts of California have consistently refused to apply the heightened standards of review set forth by this Court in *Nollan* and *Dolan* (Petition at 10), the Court of Appeal in this case did not refuse to apply them. Petitioner alleges that the court below continued to cite *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, 4 Cal. Rptr. 2d 114 (1992), *cert. denied*, 113 S. Ct. 191 (1992), for the proposition that *Nollan's* heightened standard of review does not apply to regulatory takings, and asserts that "the decision below extends an unbroken line of California cases that decide federal takings issues in a manner that directly conflicts with the settled jurisprudence of this Court." (Petition at 12.) In fact, however, while the California appellate court cited *Blue Jeans Equities* in a paragraph summarizing the "considerable judicial comment" on the applicability of the *Nollan* standard to regulations compelling payment of a fee (App. at A-9 to A-10), it then concluded:

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[2] The heightened scrutiny in *Nollan* and *Dolan* arose as a result of this Court's determination that when a public agency requires dedication of land or easements which vests outsiders with a right to pass across the landowner's property, it deprives the owner of one of the sticks in the bundle of rights that constitutes property, the right to exclude others. *Dolan v. City of Tigard*, 129 L. Ed. 2d at 316.

> We find that we need not enter the fray. As we will explain, even if we assume Nollan applies to the fees involved in this case, the record relevant to the County's motion does not demonstrate the existence of a triable issue of fact about the constitutional justification for the imposition of such fees.

(App. at A-10.)

After reviewing the undisputed facts in the case, the court below found that those facts were sufficient to support a determination as a matter of law that the fees in issue reflected an "individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development." (App. at A-19, *citing Dolan v. City of Tigard*, 114 S. Ct. at 2312.) The court also determined that the County's determination of the proportionate share of costs to be paid by each new development accomplished the "roughly proportional" distribution of costs required by *Dolan*. (App. at A-20.) In brief, the court below explicitly applied the *Nollan/Dolan* standards.

Thus, the decision below does not constitute either a refusal by a renegade California court to follow the precedents of this Court (*see*, Petition at 10) or a California case that decides federal takings issues in a manner that conflicts with the jurisprudence of this Court (Petition at 12). There is no conflict. This Court's review of the first Question Presented in the Petition should await a case in which the court below squarely decides whether the *Nollan/Dolan* standards apply in fee cases, with a reasoned opinion supporting its decision.[3] (*See, Yee v. Escondido*, 503 U.S.

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[3] The Petition's allegation that this Court "emphasized the applicability of *Dolan* to development fees" by vacating the decision of the California Court of Appeal in *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 468 (1993), and remanding for reconsideration in view of *Dolan*, 114 S. Ct. 2731 (1994) (Petition at 5; *see also*, 11), overstates the significance of that order. A remand order "should not be read as implying that [the intervening case] necessarily mandates reversal." *Bush v. Lucas*, 647 F.2d 573, 575 (5th Cir. 1981), *aff'd*, 462 U.S. 367 (1983). The California Court of Appeal has issued an unpublished decision on remand in *Ehrlich*, and the California Supreme Court granted review on March 16, 1995. California Supreme Court No. SO33642.

519, 538 (1992) ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of . . . lower court opinions squarely addressing the question.")

**B. The court below correctly upheld the fee, based on undisputed facts.**

The second Question Presented in the Petition asks the Court to determine the validity of a development fee, "based on a 30-year extrapolation of a one-time general fund revenue shortfall, imposed with no showing of any relationship to adverse impacts attributable to the owner's proposed use of his land . . . ." (Petition at i.) The California Court of Appeal correctly noted that Jones's challenge to the fee at issue focused upon the method utilized by the County to arrive at the amount assessed to Jones. (App. at A-11.)

Not only the Question Presented, but also Jones's Statement of the Case (Petition at 4) and Argument (Petition at 13), allege that the fee was based on a 30-year extrapolation of a single year's budget deficit.[4] The Court of Appeal rejected this argument:

> The UC Study consists of 34 pages of single spaced text, interspersed with tables and summaries of information, along with nine pages of appendix which set out additional supporting data and tables. We have reviewed all of it. We have been singularly unsuccessful in finding in any part of it anything

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[3] Continued

In any event, the ad hoc recreational facilities mitigation fee imposed in *Ehrlich* differs from the fee in this case, which was legislatively imposed on all new residential and industrial development.

[4] The Petition suggests that the same amount will be charged to all proposed residential units for the next 30 years. (Petition at 4; *see also*, 23.) However, County Resolution 381-90 provides for the fee amount to be reviewed every two years. (App. at F-5.) County Ordinance No. 1796, Appendix E, also provides for a review of unexpended or uncommitted fees after five years, and refunds of fees for which a need cannot be demonstrated. (App. at E-3, § 3.30.040 B, C.)

> which even vaguely reveals that the fees in issue were based upon a general fund deficit in 1989 or any other year.

(App. at A-22.)

By submitting the undisputed facts (summarized in the decision below at App. A-12 to A-18), the County met its burden of demonstrating that its residential fees were based on the increased costs attributable to new residential development. Jones did not dispute these facts.

> Surprisingly, Jones did not put forth any additional facts for the trial court's consideration in ruling upon the motion. In particular, Jones's opposition did not include any evidence which supported a finding by a trier of fact that the development fees charged to Jones were based upon a 1989 general fund deficit and were unrelated to any rationally determined projected costs of future County services made necessary by rationally determined projected future development.

(App. at A-18.) The decision below was based on the County's undisputed evidence.

The California Court of Appeal correctly determined that the fee meets the tests established by this Court. Clearly, payment of Tuolumne County's impact fee will "substantially advance a legitimate state interest" by providing revenue that the County must have in order to provide governmental services to new residents and employees. While all of the facilities provide important services, the largest component of the fee is "public protection" (police and fire services and facilities). The U.C. Study concludes that $13 million of the $18.25 million needed for capital facilities is being used to fund public protection, including fire equipment, jail, and courthouse facilities. (Joint Appendix in Lieu of Clerk's Transcript at 216, U.C. Study at 19.) These facilities promote the highest possible public interests – the prevention of death and injury to people and protection of property.

There is clearly a substantial relationship or "nexus" between the governmental interest in providing services and facilities to serve new development and the imposition of development fees. The fees were calculated separately for residential development, based on the services and facilities required by new residents, and for industrial development, based on the services and facilities required by new employees. (App. at A-13 to A-17.) No fees were imposed on commercial development, because the study found that such development did not result in net costs to the County. (App. at A-15, Fact No. 14.)

The California Court of Appeal correctly determined that the facts produced by the County and undisputed by Jones are sufficient to support a determination as a matter of law that the fees in issue reflected an "individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development." (App. at A-19, *citing Dolan v. City of Tigard*, 129 L. Ed. 2d 304 (1994).) The costs of new residential development were calculated on a per capita basis, and the fees were then calculated per dwelling unit. (App. at A-13 to A-14.) The fees varied depending on whether the property was within or outside of the fire district. (App. at A-15.)

Jones's residential project was a single dwelling unit within the fire district. This dwelling unit will have residents. The residents will require a pro rata share of facilities and services. The fee was calculated to pay for their proportionate share. It is thus erroneous to suggest, as the second Question Presented does, that the fee was imposed "with no showing of any relationship to adverse impacts attributable to the owner's proposed use of his land." (Petition at i.)

The County's fee was calculated in a manner that provides both an individualized determination and rough proportionality.

> [T]he undisputed facts justify a conclusion the fees were calculated so as to require the proponents of new development to pay their representative proportionate share of the net costs of extended government services and capital improvements,

> which the new residents were expected to actually receive and which were made necessary by new development in the County.

(App. at A-19.) The Court of Appeal correctly determined that the fee complies with the standard set forth in *Dolan*.

### C. This case presents only a narrow issue, turning on the County's method of calculating its fee.

In its challenge to County's method of calculating the fees on its residential development, Jones completely fails to mention California Government Code Sections 66000-66007. These statutes were enacted in 1987 in response to this Court's decision in *Nollan*, and set forth the applicable standards for determining the validity of impact fees. Tuolumne County complied with those standards when it adopted its fees. Section 66000(b) defines "fee" to mean a "monetary exaction . . . which is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project . . . ." Section 66001 (App. at 1-1, 1-2, *infra*) sets forth a number of standards that must be met when a local agency establishes, increases, or imposes a fee. The agency must determine that "there is a reasonable relationship between the fee's use and the type of development project . . . ." CAL. GOV'T CODE § 66001(a)(3) (West Supp. 1995). The agency must determine that "there is a reasonable relationship between need for the public facility and the type of development project . . . ." CAL. GOV'T CODE § 66001(a)(4) (West Supp. 1995). The agency must determine that "there is a reasonable relationship between the amount of the fee and the cost of the public facility. . . ." CAL. GOV'T CODE § 66001(b) (West Supp. 1995).

California Government Code Sections 66000-66007 require a California public agency to demonstrate the relationship between the impact of new development and the agency's requirement for payment of an impact fee. Petitioner did not challenge the California statutory scheme. The adequacy of California Government Code Sections 66000-66007 to ensure compliance

with this Court's decisions should be reviewed in a case that directly challenges those provisions, not in a case that turns on Tuolumne County's method of calculating its fee.

## II.

## THE UNPUBLISHED OPINION OF THE COURT OF APPEAL NEITHER CREATES NOR CONTRIBUTES TO A CONFLICT BETWEEN THE STATE COURTS OF CALIFORNIA AND NEW YORK

### A. The New York cases do not address the imposition of purely monetary development fees.

Neither of the two New York cases cited in the Petition (*Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989), *cert. denied*, 63 U.S.L.W. 3707 (1989), and *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 643 N.E.2d 479, 618 N.Y.S.2d 857 (1994), *cert. denied*, 493 U.S. 976 (1995)), shed any light on the first Question Presented in the Petition. Neither involves the imposition of monetary development fees or the proper calculation of such a fee. Those cases do not raise or answer the question whether the heightened scrutiny of *Nollan* and *Dolan* applies to a purely monetary development fee imposed as a condition of approval of development that will burden public facilities and services. The Petition demonstrates no conflict between California and New York decisions on that issue, because the New York cases cited simply do not address it.

### B. California courts are not refusing to follow *Dolan*.

The Petition alleges that "New York now follows this Court's *Dolan* decision while California does not." (Petition at 22.) For this proposition, the Petition cites a single California appellate decision, *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060 (1995), a case decided after the decision below in this case. Petitioner alleges that *Del Oro Hills* misstates this Court's holding in *Agins v. Tiburon*, 447 U.S. 255 (1980). (Petition at 22-23.) If so, the remedy lies in review of *Del Oro*, not in review of this case. The decision below correctly states this Court's *Agins* test. (App. at A-7.)

The only other reported California decision we have found citing *Dolan* is the California Supreme Court's decision in *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994), *cert. denied*, 115 S. Ct. 1176 (1995), which is not a fee case. That case does not present a refusal to follow *Dolan*, which the California Supreme Court cites in its discussion of the Takings Clause. *Id.* at 10. There simply is no series of California cases refusing to follow *Dolan*.

In any event, the California Court of Appeal in the decision below actually did apply the *Dolan* standards, and held that the Tuolumne County fee met even the heightened standard of scrutiny. (App. at A-10, A-19 to A-20.) Jones may disagree with the County's method of calculating the fee in this case, but the precise method of calculating the fee hardly rises to the level of a conflict with the state courts of New York.

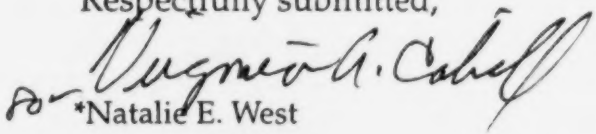
## CONCLUSION

Jones seeks certiorari to review an unpublished decision by the California Court of Appeal upholding a $1,723.81 development impact fee on its residential development. For the reasons given above, there is no basis for granting the writ.

Respondent Tuolumne County respectfully requests that this Court deny the Petition for Writ of Certiorari.

Dated: May 19, 1995

Respectfully submitted,



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# APPENDIX 1

## California Government Code Section 66001

**§ 66001. Fee as condition of approval; agency requirements**

(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall do all of the following:

(1) Identify the purpose of the fee.

(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

(b) In any action imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to Section 66006.

(d) The local agency shall make findings once each fiscal year with respect to any portion of the fee remaining unexpended or uncommitted in its account five or more years after deposit of the fee to identify the purpose to which the fee is to be put and to demonstrate a reasonable relationship between the fee and the purpose for which it was charged. The findings required by this subdivision need only be made for moneys in the possession of the local agency and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date.

(e) Except as provided in subdivision (f), the local agency shall refund to the then current record owner or owners of lots or units of the development project or projects on a prorated basis the unexpended or uncommitted portion of the fee, and any interest accrued thereon, for which need cannot be demonstrated pursuant to subdivision (d). A local agency may refund the unexpended or uncommitted revenues by direct payment, by providing a temporary suspension of fees, or by any other means consistent with the intent of this section. The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.

(f) If the administrative costs of refunding unexpended or uncommitted revenues pursuant to subdivision (e) exceed the amount to be refunded, the local agency, after a public hearing, notice of which has been published pursuant to Section 6061 and posted in three prominent places within the area of the development project, may determine that the revenues shall be allocated for some other purpose for which fees are collected subject to this chapter and which serves the project on which the fee was originally imposed.

(Added by Stats. 1987, c. 927, § 1, operative Jan. 1, 1989. Amended by Stats. 1988, c. 418, § 8.)